IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1113 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-
and
Hon'ble MR.JUSTICE H.K.RATHOD sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
No

2. To be referred to the Reporter or not? Yes

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
No

5. Whether it is to be circulated to the Civil Judge? No :

NEW INDIA ASSURANCE CO.LTD.

Versus

BHAGVANBHAI DANABHAI

Appearance:
MR RAJNI H MEHTA for Petitioner
MR JAYANT PATEL for Respondent No. 1
DELETED for Respondent No. 2
MR PJ KANABAR for MR PM THAKKAR for Respondent No. 3

CORAM : MR.JUSTICE D.C.SRIVASTAVA
and
MR.JUSTICE H.K.RATHOD

Date of decision: 27/06/2000

ORAL JUDGEMENT

(Per : D.C.Srivastava, J.)

1. This Appeal arises out of a common judgment rendered by the Motor Accident Claims Tribunal, Rajkot on 22.2.1985 deciding several claim petitions and rendering Awards in those claim petitions. The instant Appeal arises out of Claim Petition No.616 of 1982.

2. Brief facts giving rise to this Appeal shortly are as under :

An accident took place on 7.9.1982 at about 3.45 p.m. on Rajkot - Morbi State High-way near village Bedi. A Public Carrier No.GTX 8202 driven by the first opponent before the Tribunal with some inmates in it was moving on the road. While it was passing over the bridge near village Bedi it went off the road due to the fact that the driver lost control over it and the vehicle plunged into river bed by breaking the side railings of the bridge. The deceased was inmate in the vehicle. The deceased was travelling in the vehicle along with his goods. He had paid fare to the driver of the vehicle. In the accident he sustained injuries and ultimately died. Claim petition No.616 of 1982 was filed by his legal representatives claiming compensation. The passer-by was also thrown off. Various persons sustained injuries and 7 of them died. Claim petitions were filed on behalf of legal representatives of the passengers travelling in the goods vehicle and also by the legal representatives of the passer-by who was thrown and died. It is said that in the instant case the passer-by was not a passenger in the vehicle. Injured claimants also filed several claim petitions. It was a case that the passengers in the vehicle were transporting their goods to their villages. The accident was alleged to have taken place due to rash and negligent driving of the vehicle by the driver.

3. The present Appellant Insurance Company resisted the claim petition denying rashness and negligence on the part of the driver. It was also pleaded that the inmates in the vehicle were passengers, including the deceased, on payment of charges hence they are not entitled to any claim. It was further pleaded that the vehicle in question was used in violation of conditions of the

Policy and permit hence also no claim can be sustained. The last plea was that the vehicle was not being driven by the driver hence also the Insurance Company is not liable to pay any compensation.

4. The Tribunal found that the deceased was a passenger on payment of charges and was carrying his goods in the vehicle hence the Insurance Company within the ambit of Insurance policy and permit is liable to pay compensation. With this finding the claim petition was decreed for Rs.27,600/- only.

5. In this Appeal there are three respondents. The respondent No.1 is claimant, the respondent No.2 was the driver who was subsequently deleted, the respondent No.3 is the owner of the vehicle. Nobody has appeared on behalf of respondent No.3 despite sufficient service of notice of this Appeal. Shri Jayant Patel, learned Advocate appeared and made a statement that he was appearing for the claimant, but after his death he did not receive any Vakalatnama from the legal representatives of the deceased claimant. As such he is not appearing on behalf of the respondent No.1. However, Shri P.J. Kanabar on behalf of Shri P.M.Thakkar states that he is representing the claimant - respondent No.1 and also his legal representatives respondents No.1/1 to 1/4. As such Shri R.H.Mehta, learned Advocate for the appellant and Shri P.J.Kanabar have been heard.

6. The contention of Shri Mehta has been that since the goods vehicle was used in contravention of the conditions laid down in the Insurance policy, the Insurance Company - appellant is not liable to pay any compensation. The relevant terms upon which Shri Mehta placed reliance have been quoted in Para : 3 of the Memo of Appeal, which reads as under :

"Limitation as to use of the vehicle in the policy".

"Use only for a public carrier's permit within the meaning of the Motor Vehicles Act, 1939."

The Policy does not cover -

1) Use for organised racing pace-making reliability trial or speed testing;

2) Use while drawing a trailer except the towing other than the reward of anyone disabled mechanically propelled vehicle;

3) Use for the conveyance of passengers for hire or reward."

It is this sub-clause (3) which was pressed into service by Shri Mehta in support of his argument that the vehicle was not to be used for conveyance of passengers for hire or reward and since the vehicle was used in contravention of this condition of the policy the Insurance Company is not liable to pay any compensation. He has also drawn our notice to the evidence and material on record and contended that the passengers in the vehicle were travelling by paying Rs.1/- as fare to the driver and were also carrying their goods like Sugar, Oil Cake and food grains, etc. He, therefore, contended that mere paying of fare to the driver will not covert them as passengers nor the vehicle can be changed from the nature of goods vehicle to a vehicle meant for carriage of passengers. He has relied upon the latest verdict of the Apex Court in Smt. Mallawwa, etc. v/s. The Oriental Insurance Co.Ltd. & ors., reported in JT 1998 (8) SC 217.

7. As against this Shri Kanabar has raised three contentions to negative the contention of Shri Mehta. His first contention has been the doctrine of merger. The second contention has been that because the driver, Opponent No.2, has been deleted and since the Award was confirmed by this Court in First Appeal No.1109 of 1985, in the said judgment the Award of the Tribunal has merged and since one of the judgment debtors has been deleted the judgment of this Court in the aforesaid First Apeal will be binding upon the Appellant. The third contention has been that since a very small amount has been awarded by the Tribunal no interference is called for.

8. So far as last contention of Shri Kanabar is concerned we do not think that a sum of Rs.27,600/- is so insignificant and meager amount upon which interference is not called for or that the Appeal should be summarily rejected on this ground. This contention is contrary to the provisions of Section 173(2) of the Motor Vehicles Act which provides that no appeal shall lie against any award of a claim's Tribunal, if the amount in dispute in the appeal is less than ten thousand rupees. Since the amount of the impugned award is Rs.27,600/- it certainly exceeds Rs.10,000/- hence the appeal has to be heard and decided on merits. Summary rejection of this Appeal is also not called for especially when our attention is drawn to a latest verdict of the Apex Court in Smt. Mallawwa's case (supra). Further doctrine of merger propounded by Shri Kanabar also requires consideration.

We therefore do not find force in the contention of Shri P.J. Kanabar that the Appeal should be dismissed because meagre amount has been awarded by the Tribunal.

9. We also do not find much force in the contention of Shri Kanabar that because the driver has been deleted the Insurance Company is bound by the judgment rendered by this Court in First Appeal No.1109 of 1985 decided on 28.4.1993. Each case has to be decided on its own facts. Simply because several Awards were rendered through a common judgment it cannot be said that all the Awards have attained finality because of the judgment of this Court in First Appeal No.1109 of 1985. The deletion of driver, therefore, does not operate as estoppel against the appellant in pressing the Appeal. We, therefore, do not find force in this contention of Shri P.J.Kanabaras well.

10. The last contention of Shri P.J.Kanabar has been regarding doctrine of merger. His contention has been that because this Court in First Appeal Nos.1109 to 1112 of 1985 has dismissed four connected Appeals arising out of the same judgment and Award rendered by the Tribunal, the Award rendered by the Tribunal has been merged in the Judgment of this Court in the aforesaid four Appeals. Consequently the same common judgment and award cannot be challenged. Here also we are unable to agree with Shri P.J.Kanabar. No doubt common judgment was rendered by the Tribunal in which all the claim petitions were decided, but seperate claim petitions were considered in the common judgment on the factual controversy and also for assessing the compensation to be awarded to each claimant in each claim petition. The finality which can be said to have been attached by decision of the aforesaid four Appeals No.1109 to 1112 of 1985, decided by this Court will be limited to the awards arising out of those four claim petitions and not that it will operate as final judgment so far as first Appeal No.1113 of 1985 under our consideration is concerned. It may also be mentioned that the doctrine of merger cannot safely be applied to the facts of the case before us. In those four Appeals No.1109 to 1112 of 1985 the Division Bench of this Court following the Full Bench's Verdict of this Court in First Appeal No.61 of 1979, decided on 26.4.1993, found that the passengers travelling in goods vehicle and paying fare to the driver were covered under the policy and in case of accident the injured or legal representatives of the deceased were entitled to compensation. Some of the Appeals which were dismissed were mainly on the ground that the compensation awarded was too meager. Thus in those four Appeals the Division

bench followed the verdict of the Full Bench in First Appeal No.61 of 1979, decided on 26.4.1984.

11. It is at this juncture that we are tempted to refer the Apex Court Judgment in Smt. Mallawwa's case (Suppra). Here the Apex Court has considered the conflicting views of various High Courts of the Country and had approved only the view of the Orissa High Court in New India Assurance Co. Ltd. v/s. Kanchan Beewa & ors., reported in 1994 ACJ 138. The Supreme Court recorded its disapproval of the contrary views taken by the other High Courts in Country. If that is so then the view of this High Court in aforesaid Four Appeals as well as the view taken by the Full Bench in the First Appeal mentioned in the foregoing portion of this Judgment will also be deemed to have been disapproved by the Apex Court. The Judgment in Smt. Mallawwa's case (supra) was rendered by the Apex Court on 27.11.1998 whereas the Judgment of the Full Bench in First Appeal No.61 of 1979 was rendered on 26.4.1993 and the Judgment of the Division Bench of this Court in First Appeal No.1109 to 1112 of 1985 was rendered on 28.4.1993, i.e. much before the view taken by the Apex court in Smt. Mallawwa's case (Supra).

12. The controversy was resolved by the Apex Court for which specific reference can be made of Para : 10 of the Judgment. The Apex Court observed that for the purposes of Section 95, ordinarily a vehicle could have been regarded as a vehicle in which passengers have carried if the vehicle was of that class. Keeping in mind the classification of vehicles, by the Act, the requirement of registration with particulars including the class to which it belonged, requirement of obtaining a permit for using the vehicle for different purposes and compulsory coverage of insurance risk, it would not be proper to consider a goods vehicle as a passenger vehicle on the basis of a single use or use on some stray occasions at that vehicle for carrying passengers for hire or reward. For the purpose of construing a provision like proviso (ii) to Section 95(1)(b), the correct test to determine whether a passenger was carried for hire or reward, would be whether there has been a systematic carrying of passengers. Only if the vehicle is so used then that vehicle can be said to be a vehicle in which passengers are carried for hire or reward. It is this test which is to be kept in mind while deciding whether a particular vehicle can be said to be goods vehicle or it can be said to have been converted into passenger vehicle simply because on one occasion some passengers were carried on it on payment of fare and also

were permitted to carry the goods owned by them. The test laid down by the Apex Court if applied in strict sense it can be said from the facts of the case before us that it was a goods vehicle and the nature of vehicle will not be changed merely because the passengers were permitted to use it for carrying their goods on payment of freight and they were permitted to use the vehicle on payment of fare for them. It could not be shown before us from the evidence on record that the offending vehicle in question was regularly used for carrying passenger and their goods after charging freight and fare. Consequently the vehicle in question remained a goods vehicle and it was used contrary to the terms contained in the Insurance Policy narrated by us above. The case is, therefore, fully covered by the Apex Court's verdict in Smt. Mallawwa's case (supra).

13. In Para : 10 of the aforesaid judgment in Smt. Mallawwa's case the Apex Court has taken specific note of the fact that the High Courts have expressed divergent views on the question whether a passenger can be said to have been carried for hire or reward when he travels in a goods vehicle either on payment of fare or along with his goods. The Apex Court did not consider it necessary to refer those decisions but for our purposes it will be implied that the view taken by this Court which must have been brought to the notice of the Apex Court, as it runs contrary to the view taken by the Orissa High Court in New India Insurance Co. v/s. Kanchan Bewa & Ors. (Supra). Since the Apex Court approved the view taken by the Orissa High Court, we, with respect, are unable to follow the Full Bench's verdict of this Court in First Appeal No.61 of 1979, decided on 26.4.1993, and also the Division Bench of this Court in First Appeal Nos.1109 to 1112 of 1985, decided on 28.4.1993. The doctrine of merger thus propounded by Shri Kanabar does not appeal to our reason and we are therefore rejecting the same.

14. If the verdict of Smt. Mallawwa's case (supra) is applicable to the facts of the case then certainly the Tribunal fell in error in awarding compensation against the Appellant Insurance Company. Of course we do not think it proper to disturb the Award so far as other respondents are concerned, but certainly the appellant New India Assurance Company cannot be held liable for the reasons stated above. The award operating against the appellant has therefore to be set aside.

15. The Appeal, therefore, succeeds and is hereby allowed with no order as to costs. The Award of the Tribunal in M.A.C.Petition No.616 of 1982 against the

appellant is quashed. Shri Mehta has pointed out that the appellant has deposited the entire amount of Award, interest and cost before the Tribunal. He also felt that some or the whole of the amount must have been withdrawn by the claimant. He is, therefore, not sure what is the position of disbursement of the amount deposited by the appellant. As a consequence of the Appeal being allowed we direct the Tribunal to refund to the appellant the amount, if any, which is lying with the Tribunal, or is under the control of the Tribunal which has been deposited by the appellant in M.A.C.Petition No.616 of 1982.

sd/-

(D. C. Srivastava, J.)

Date : June 28, 2000 sd/-

(H. K. Rathod, J.)

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